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Sutherland, George

The constitutional aspect of government ownership

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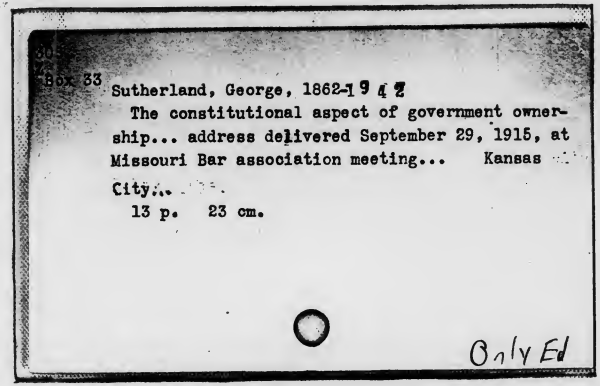

The Constitutional Aspect of Government Ownership

By

Hon. George Sutherland
United States Senator
from Utah

Address Delivered September 29, 1915,
at Missouri Bar Association Meeting
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There are a good many people in this country who have become absorbed in the pleasant pastime of persuading themselves that any of the ills of society may be cured by denouncing the disease and prescribing a statute or some other form of governmental intervention. Increasingly, the demand is that the *Federal* Government shall do something. "Progress" has come to be the most perverted word in the dictionary: no longer synonymous with improvement, it merely signifies change. The old wisdom which looked ahead for a definite terminus has been discredited in favor of an immediate start and a swift journey. Any place is better than where we are. The lessons of history, if they be read, the informing voice of experience, if it be heard, provoke only a feeling of impatience. The vague sentiment of the moment, the passionate call of the visionary, the specious appeal of the demagogue, are exalted above the sober wisdom of the centuries and the supreme restraints of the constitution. There is apparently a growing tendency to regard the limitations of our fundamental law as impertinent advice to be ignored if it happen to conflict with the prevailing whim of the moment. Many of us, however, still entertain a feeling of respect for that ancient document and continue to regard its provisions as binding whether they chance to coincide with our present desires or not. To such, no apology need be made for an attempt to point out some obstacles which the constitution presents to a propaganda whose appeal seems to be growing more insistent and which seeks to interject the Federal Government into the field of substantive commerce as a common carrier of goods and passengers by land and sea. The practical objections to such a departure from the traditional policies of the government have been frequently and vigorously urged; the constitutional objec-

tions have been quite generally overlooked or their non-existence taken for granted.

Probably the greatest parliamentary struggle which this country has witnessed in recent years, took place in the United States Senate during the last session of Congress over the unsuccessful attempt to enact the so-called Ship Purchase Bill. That measure provided for the organization of a corporation under the laws of the District of Columbia, to purchase, construct, equip and operate merchant vessels in the foreign trade of the United States. A majority of the stock, in any event, and all of it, contingently, was to be subscribed by the government. Provision was made for a corporate board of trustees, but all substantial power over the affairs of the corporation was vested in a body of government officials to be known as the Shipping Board. The corporation sought to be created by this bill was not to be an independent, privately managed concern, but a mere agency, through which the Government of the United States sought to engage in business as a common carrier by water for hire. Of course, the Federal Government cannot utilize a corporation to perform any function or do any act which it is without constitutional power to perform or do through the medium of an official or an individual. This bill, therefore, may be considered, so far as the constitutional question is concerned, as though the powers conferred upon the corporation had been conferred upon a member of the Cabinet or upon a bureau or commission; and thus considered it presents the naked question: Is the Federal Government authorized by the Constitution to engage in the carrying trade, a business heretofore in private hands? To carry goods or passengers by rail or by ship is essentially no different in principle than to carry goods upon a cart or passengers in a cab. The building and maintenance of a street over which the cart or cab is drawn is a proper function of government. It has never hitherto been suspected, however, that the carter who transports a trunk or the cabman who carries a passenger from a hotel to the railroad station is exercising a portion of the sovereignty of the state. He is engaged in business and not in the discharge of a governmental function. Is carriage by ship or by rail likewise business or is it a governmental function? Whatever may be the fact as to the power of some particular state or of some particular municipality to engage in trade, no such power *in terms* has been vested in the Federal Government. I have always entertained the notion—a little bit old-fashioned, perhaps—that the thing the Federal Constitution created was a government and not a business enterprise, and that a government undertaking to run a business or a business undertaking to run a government was something not to be tolerated by a mind capable of comprehending the essential qualities of either. A government engaged in business, combines the incongruous functions of

a sovereign seeking customers and a trader administering laws. As Adam Smith has well said: "No two characters seem more inconsistent than those of trader and sovereign." If the government engage in the carrying trade by land or sea, it will either take possession of a portion of the field or it will monopolize the whole field. If it do the former—as it proposed to do by the Ship Purchase Bill—it will, as a trader, enter into competition with its own citizens, while as a government, it will regulate them in the exercise of their business rights and privileges. Think of a business organization invested with the power to regulate its competitors! To the government, the making of profits is of small concern; to the private citizen, profits are vital. The government may run at a loss indefinitely and recoup its losses by general taxation; the private citizen who continues to run at a loss has no alternative but bankruptcy. If, then, the government be his competitor, he may be compelled not only to stand by and see his business go to ruin, but, as a taxpayer, to contribute to the resources of his rival to the end that his own ruin may come the more quickly. On the other hand, if the government take possession of the entire field, it will close the door of opportunity to the individual and substitute a socialistic bureaucratic monopoly—and what will very likely turn out to be an *inefficient* bureaucratic monopoly—for the enterprise and initiative and thorough-going efficiency of individual competition. Personally, I have no doubt that government management of any business is not only less efficient, but vastly more expensive and wasteful than private management. We are sometimes told that the postoffice department is self-supporting. It should be, but, in fact, it is not and it never has been. The favorable balance sometimes shown is fictitious, since the accounts exhibit only a part of the debit side. The large sum invested in the public buildings throughout the United States, used principally for postoffice purposes, is not taken into account. This expenditure, as well as the expense for the care and maintenance of the buildings, is carried by the general treasury, as is also, the outlay for other expenses, including the salaries of the postmaster general and other general officers. If the accounts were kept as any private business must keep its accounts, the annual deficit disclosed would be of startling proportions. Not the least of the evils of government operation of railroads, merchant vessels, telegraph and telephone lines and so on, would be the vastly increased burden of official administration. Already the increase in the legitimate exercise of power is threatening to overload the Federal Government. Is it wise to imperil its efficiency by adding the enormous responsibility of operating the carrying trade of the United States, with its twenty billion dollars of capital and its two million employees? If we should take over these various activities which I have just men-

tioned, the total number of employees upon the government payrolls would aggregate in round figures three millions, enough to control by organized effort our national elections and dictate the policies of the government. Very probably, two tendencies would be developed, both calculated to deplete the treasury: First, a tendency in the direction of making not altogether indispensable expenditures for the advantage of particular localities or groups of persons whose good will the politicians would be anxious to secure and retain, and, second, a tendency in the direction of unduly decreasing the rates for freight and passenger transportation in order to cultivate the good will of that very numerous class of voters who would constitute the patrons of the government. There is much complaint, and, on the whole, very just complaint, respecting the wasteful appropriation of money by the rivers and harbors and the public buildings bills. With the railroads in the hands of the government, the average congressman, in addition to seeking an appropriation for the improvement of some non-navigable creek and the erection of some unnecessary public building in his district, would demand the erection of expensive railroad stations and the construction of branch lines, wholly irrespective of their necessity or ability to produce income, but with an eye single to enhancing his own popularity with his constituents. Much more might be said to the same effect, but I must not pursue the practical phase of the subject further, but come directly to the legal question which I set out to discuss. There is in the minds of many people, including some lawyers, a vague notion that the Constitution contains some comprehensive grant of power which enables Congress to enact any law that may appear to be for the general welfare. I need not say to this distinguished assembly of lawyers, that there is no such power; that the general welfare clause found in the preamble, is nothing more than an announcement of one of the general purposes which the Constitution was intended to accomplish; that the general welfare clause contained in the grant of powers, is merely a limitation upon the taxing power; that neither constitutes a substantive grant of authority; and, finally, the United States being emphatically a government of enumerated powers, that Congress can exercise no power not expressly granted or arising by implication as appropriate to carry the express powers into effect. In this view of the matter, under what provision of the Constitution is the Federal Government authorized to become a common carrier of goods and passengers? Certainly it is not by virtue of any of the several war powers, nor under the power to establish postoffices and post roads, coin money, borrow money, lay and collect taxes, promote science and the useful arts, dispose of territory and other property or constitute judicial tribunals. And so we may take the other powers and by a process of elimination, which

it is not necessary to follow in further detail, we shall find no provision which remotely lends color to the claim that the United States may engage in business of any sort, until we come to the commerce clause, and that, I think, is the only provision of the Constitution which we need consider in this connection. The commerce clause reads as follows:

"To regulate commerce with foreign nations and among the several states and with the Indian tribes."

Let us examine this provision. The thing which Congress is authorized to accomplish, is *regulation* and not something else. The thing which Congress is authorized to regulate, is *commerce* and not something else. Congress is just as powerless to do something with reference to commerce which is not *regulation*, as it is to regulate something which is not *commerce*. In Gibbons vs. Ogden, the Supreme Court defines the power of regulation as the power, "to prescribe the rule according to which commerce should be carried on." In Welton vs. Missouri, the court said that the term to regulate commerce means, "to prescribe rules by which it should be governed, that is, the conditions upon which it shall be conducted." Is the power to conduct a business included within the power to prescribe the conditions upon which it shall be conducted? If the limit of my authority be to condition the way in which a thing shall be done, have I the power to do the thing itself? Is the activity and the regulation of the activity one and the same thing?

The Supreme Court of the United States has held it to be within the power of the Federal Government to build a highway to connect several states, (Indiana v. U. S., 148 U. S. 148); to construct or authorize others to construct a railroad through several states, (California v. Pacific Railroad, 127 U. S. 1, 39); to build a canal, (Wilson v. Shaw, 204 U. S. 24); or a bridge or to create a corporation for these purposes, (Luxton v. North Bridge Co., 153 U. S. 525). The building of the highway might be justified under the power to establish post roads, the building of the Panama canal under the war powers, the authorization of the Pacific railroads under both, but if all of them be justified under the power to regulate commerce they still furnish no precedent for the exercise of the power I am now discussing. A railroad, a highway, a bridge, or a canal conditions commerce since it facilitates transportation. Transportation is commerce, but the road, bridge or canal is not commerce; it is a physical thing over which commerce is carried on. The building of a road, bridge or canal, broadly considered, *regulates* commerce, since it affects the manner in which commerce may be conducted. The act, however, of carrying goods or passengers over the road, bridge or canal is not *regulation* of commerce, *it is commerce itself*. The difference bewteen an act of Congress directing or authorizing the build-

ing of a road and an act of Congress putting the government into the substantive business of carrying goods and passengers over the road is, therefore, the difference between adjusting conditions so as to facilitate commerce and engaging in commerce.

It has been urged that the power to engage in commerce may be implied from the power to regulate—or, in other words, that engaging in business is one way of regulating it. As I have already suggested, there are two kinds of powers under the Constitution: First, the substantive powers, or what are generally called the express powers, and, second, the ancillary or implied powers. What are these ancillary powers? They are simply powers which Congress may employ, not as ends in and of themselves, but as means to the end of effectuating the substantive powers. In the exercise of these substantive powers, as the courts have determined over and over again, Congress must confine itself strictly to the grants enumerated in the Constitution. In the exercise of its implied powers it has a wide range of choice, but always to the end that one or more of the express powers shall be made operative; never to the accomplishment of something not granted.

The framers of the Constitution in their anxiety to safeguard the several states and the people against any usurpation on the part of the general government not only proceeded with jealous care to specifically enumerate the powers they intended that government to have—which would seem to have been a sufficient protection against any extension of power, on the principle of *expressio unius est exclusio alterius*—but they added the Tenth amendment, which reads:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or the people": not to the states alone, be it observed, but, in the alternative, to the people.

If the power to regulate commerce had not been granted to the Federal Government it would have remained in the states as one of the reserved powers, since it is inherently a governmental function. The power to engage in commerce is a substantive power equal in dignity to, and vastly more valuable than, the power to regulate commerce. The power to *engage in* commerce, however, is vitally and fundamentally different from the power to *regulate* commerce. Both antedated the Constitution, but the former was a *governmental power* and the latter was an *individual right*, which the people of that day would never have surrendered, in whole or in part, to any government, and which, by the Tenth amendment, they reserved to themselves. Under a distinct power to do a particular thing (regulate commerce) the power to do a different thing (carry on commerce) cannot be implied. The framers understood the force and effect of words. They selected the language of the Constitution with extreme

care. When they intended the general government to have the power to *do* a particular thing or *exercise* a particular activity as distinguished from the power to *supervise* or *regulate* it, they found no difficulty in saying so. For example: Congress is given power to coin money. Suppose the power had been to *regulate* the coinage of money, and suppose that for a century and a quarter the several states exclusively had coined money—as for a century and a quarter the people exclusively have conducted the business of transportation—the general government confining itself to prescribing rules to insure uniformity of values, size, weight and so on, and otherwise regulate the manner and character of the coinage, would anyone at this late day entertain the opinion that the general government possessed the power to actually coin money? The Supreme Court of the United States in the case of South Carolina vs. The United States, 199 U. S. 450, said:

"To determine the extent of the grants of power we must therefore place ourselves in the position of the men who framed and adopted the Constitution and inquire what they must have understood to be the meaning and scope of those grants."

Looking back to the history of the period when the Constitution was framed; remembering the rugged and uncompromising sentiment which held sacred the rightful activities of the individual from the interfering hand of the state; having regard to that almost universal feeling of distrust respecting all extensions of governmental power, which was crystallized in Jefferson's political aphorism, "That government is best which governs least," is it not well nigh preposterous to imagine that "the men who framed and adopted the Constitution * * * must have understood" that they were conferring upon the Federal Government the power to engage in the business of transporting freight and passengers in interstate and foreign commerce—either to the exclusion of the citizen or in competition with him? In the same case, the court further said:

"The opposition to the Constittuion came not from any apprehension of danger from the extent of power reserved to the states, but on the other hand, entirely through fear of what might result from the exercise of powers granted to the central government."

The court then proceeds to quote approvingly the following language of Judge Nott:

"Moreover, at the time of the adoption of the Constitution there probably was not one person in the country who seriously contemplated the possibility of government, whether state or national, ever descending from its primitive plant of a body politic to take up the work of the individual or body corporate. The public suspicion associated government with patents of nobility, with an established church, with standing armies, and distrusted all governments. Even in the high intelligence of the convention there were men who

trembled at the power given to the President, who trembled at the power which the Senate might usurp, who feared that the life tenure of the judiciary might imperil the liberties of the people. Certain it is, that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market and maintaining place and power by means of what would have been called, in the heated invective of the time, 'a legion of mercenaries', had been in the public mind, the Constitution would not have been adopted, or an inhibition of such power would have been placed among Madison's amendments."

The Supreme Court of Kansas in State vs. Kelly, 81 Pac. Rep. 459, said:

"It has been the policy of our government to exalt the individual rather than the state, and this has contributed more largely to our rapid national development than any other single cause. Our Constitution was framed and our laws enacted with the idea of protecting, encouraging, and developing individual enterprise, and if we now intend to reverse this policy and to enter the state as a competitor against the individual in all lines of trade and commerce we must amend our Constitution and adopt an entirely different system of government."

The precise question I am discussing has seldom arisen in the American courts. The Supreme Court of the United States, so far as I know, has never considered it. There is, however, a decision of the Supreme Court of Minnesota (Rippe v. Becker, 56 Minn. 100), which is exactly in point. That case held that an act of the Legislature providing for the erection of a state elevator at Duluth for public storage of grain, was not an exercise of the police power of the state to regulate the grain elevator business. And let me here say, that the inherent police power of the state to regulate various business activities has precisely the same meaning and scope as the delegated power of the general government to regulate commerce. Indeed, in essence, the power granted by the commerce clause is the police power. The opinion of the court in the Minnesota case is most illuminating. I should like to quote from it at length, but must be content with one or two brief excerpts. The position of defendant's counsel is stated by the court as follows:

"That whenever those who are engaged in any business which is affected by a public interest and hence the subject of government regulation, do not furnish the public proper and reasonable service, the state may, as a means of regulating the business, itself engage in it and furnish the public better service at reasonable rates, or, by means of such state competition, compel others to do so."

This contention the court emphatically denies, saying:

"The very statement of the proposition is sufficient to show to what startling results it necessarily leads. It needs no argument to prove that if, in the exercise of the police power to regulate this business, the state itself has a right to erect and operate one elevator at Duluth, it has the power to erect and operate twenty, if necessary,

at the same point, and also to erect and operate elevators at every point in the state where there is grain to be handled and stored.

"Railways are also, under this same police power, the subjects of state regulation; and if it should be deemed that they were not furnishing the public with proper service, or charging unreasonable rates, it could with equal propriety be claimed that it would be a proper means of exercising the police power of regulating the business for the state itself to construct and operate competing railways. The hack business, the pawnbrokers' business, the manufacture and sale of intoxicating liquors, and numerous other kinds of business that might be named are also the subjects of state regulation; and, if counsel's contention is correct, we do not see why, as a means of 'regulating' these kinds of business, the state itself might not engage in running hacks, pawnbrokers' shops, building and operating distilleries and breweries, or even running saloons.

"But further illustration cannot be necessary. The police power of the state to *regulate* a business does not include the power to *engage in* carrying it on."

The State of South Carolina some years ago undertook to go into and monopolize the saloon business. A statute was passed prohibiting the sale of liquor except at "State Dispensaries," which were to be operated by the state. The validity of the statute was attacked upon constitutional grounds and the question was twice before the Supreme Court. In the first case (MacCullough v. Brown, 41st S. C. .....), a majority of the court held the law to be invalid upon the ground that the statute undertook to put the state into trade which they said was not a function of civil government. The court said:

"It seems to us clear that any act of the Legislature which is designed to or has the effect of embarking the state in any trade which involves the purchase and sale of any article of commerce for profit is outside and altogether beyond the legislative power conferred upon the General Assembly by the Constitution, even though there may be no express provision in the Constitution forbidding such an exercise of legislative power. Trade is not and cannot properly be regarded as one of the functions of government. On the contrary, its function is to protect the citizen in the exercise of any lawful employment, the right to which is guaranteed to the citizen by the terms of the Constitution, and certainly has never been delegated to any department of the government."

In South Carolina, as I understand, the judges are elected by the Legislature. Shortly after the decision just referred to was rendered, the term of office of one of the concurring judges expired and the Legislature elected another person as his successor; whereupon, a special session of the court was called, apparently for the sole purpose of considering this question. The new judge joined with the dissenting judge in overruling the former decision, (see 42 South Carolina 22), but both, nevertheless, concurred fully with the former opinion and with the Minnesota decision, to the effect that the state had no power to engage in trade. Their decision was based upon

the proposition that intoxicating liquor was dangerous to society and was not to be placed upon the same footing as ordinary commodities; that the state power over intoxicants being absolute, it could assume entire control over them even when trade was one of the incidents in such control. The South Carolina cases taken together, therefore, constitute strong authority in support of the position for which I am contending.

The Legislature of Massachusetts at one time submitted to the judges the question whether a statute authorizing town governments to go into the business of selling wood and coal would be constitutional. The answer of the majority of the judges was in the negative (155 Mass. 598). In the course of the opinion it was said:

"There are nowhere in the Constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as at the time when the Constitution was adopted was usually bought and sold by individuals and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. The object of the Constitution was to protect rather than to authorize the commonwealth or the 'towns, parishes, precincts, and other bodies politic' to undertake what had usually been left to the private enterprise of individuals."

Personally, I belong to that school of interpretation which teaches a broad construction of the Constitution. Stupendous changes have taken place since the convention at Philadelphia. Conditions have arisen which the fathers with all their pre-vision never contemplated and conditions will arise in the future that no one of our generation is wise enough to foresee. The Constitution is not a petrifaction: it expands as the needs of the nation expand, not in meaning, as the Supreme Court has often said, for its meaning is always the same, but in its application to every new thing and every changing circumstance, which by a liberal interpretation may be brought within the scope of its terms. We are permitted to go in new directions and to adopt new methods, provided always, the result we seek is one which is specified: we may not go in any direction or adopt any methods, old or new, in order to bring about an unspecified result. The first is fulfillment: the second is usurpation. It would seem to be reasonably clear that engaging in commerce is not regulating commerce, and does not therefore constitute a means to a constitutional end, but does of itself constitute an extra-constitutional end;—that the two things are inherently distinct and different things: one being essentially a private function outside the normal activities of government, and the other,—since one citizen, in the nature of things, cannot be intrusted with the power to regulate the conduct of another citizen—being necessarily and fundamentally a governmental function.

There is abroad in the land a spirit of unrest. Intolerant of restraint, incapable of deliberation, swayed by impulse and ruled by emotion, it would sweep aside the priceless restrictions of the Constitution, under which individual right and individual liberty rest in impregnable security, and substitute what, to borrow the felicitous phrase of Chief Justice White, may be called "the uncontrolled exuberance of vague and destructive powers." The Constitution is not a wall which obstructs: it is a rampart which protects. Behind its shelter we have become a great self-limited democracy, where, for the first time in all history, the state has ceased to be a master and has become a servant. And this has been wrought by the Constitution, for the Constitution is the ever-sounding mandate of the People to the State, "Thus far and no farther." I know of no more solemn and imperious obligation resting upon the shoulders of the American lawyer than that of raising a protesting and warning voice against any and every attempt—however plausible the excuse—to disregard or subvert this mandate of those who made the Constitution and who alone have power to alter or extend its terms.

END OF
TITLE